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No. 01-807

In The

Supreme Court of the United States

PHEASANT BRIDGE CORPORATION,

Petitioner,

v.

TOWNSHIP OF WARREN,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States, including more than 1500 members in the state of New Jersey. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution and federal statutes, particularly when such remedies are in any way obstructed by a state court.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ---, 121 S.Ct. 2448 (2001).

SUMMARY OF ARGUMENT

There now exists a sharp split in the interpretation of this Court's opinion in *First English Evangelical Lutheran Church v. County of Los Angeles* - namely, whether the decision applies to ordinances later ruled invalid. At least two courts, the New Jersey Supreme Court and the U.S. Court of Appeals for the Ninth Circuit, have come to diametrically opposite positions on that point, creating legal confusion.

In addition, the court below based its decision, in part, on the impact a takings claim might have on a local government, rather than focusing on the impact a taking has on basic constitutional rights.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *FIRST ENGLISH* HAS BEEN APPLIED IN DIAMETRICALLY OPPOSITE WAYS BY OTHER COURTS, CREATING CONFUSION AND CONSTITUTIONALLY SUSPECT OUTCOMES WHICH MUST BE CORRECTED

In finding that the Petitioner's takings claim was not worthy of legal review, the court below purported to analyze this Court's decision in *First English*. In that 'analysis,' the New Jersey Supreme Court determined that this Court's language led to but one clear and simple conclusion – *First English* did not apply to invalid ordinances.

After first declaring that a facial taking could not be established merely "as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge to the municipal zoning authority," *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343 (N.J. 2001), the court below went further still. As the Petitioner's case addressed "an invalid ordinance in which government went beyond the scope of its zoning power, rather than a valid ordinance that effected a taking," – which was the case in *First English* – the legal principles developed by the U.S. Supreme Court could not be applied at all. *Id.* at 344.

The New Jersey Supreme Court buttressed its conclusion that *First English* did not apply to invalid ordinances by quoting from this Court's opinion itself. "The Takings Clause 'is designed not to limit the governmental interference with property rights per se but

rather to secure compensation in the event of otherwise proper interference amounting to a taking.' *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)." *Id.* at 343.

Without dissecting the unique legal logic which led the New Jersey Supreme Court to remove from consideration as a taking any invalid, illegal or improper governmental action which impacts on property rights, we are left with one inescapable fact – this opinion interpreting *First English* is now the law of the land in the State of New Jersey.

Meanwhile, a continent away in California, the U.S. Court of Appeals for the Ninth Circuit has also interpreted *First English* – only this time reading the decision as applying *only* to ordinances which are later ruled invalid.

> The *First English* Court very carefully defined " 'temporary' regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts." 482 U.S. at 310. What is "temporary," according to the Court's definition, is not the regulation; rather, what is "temporary" is the taking, which is rendered temporary only when an ordinance that effects a taking is struck down by a court. In other words, a permanent regulation leads to a "temporary " taking when a court invalidates the ordinance after the taking.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 778 (9th Cir. 2000), *pet. for reh'g and reh'g en banc denied*, 228

F.3d 998 (9th Cir. 2000), *cert. granted*, 121 U.S. 2589 (2001)

While this decision was met with derision in a sharply worded dissent on the petition for rehearing, it is the law not merely in California, but throughout the entire Ninth Circuit.

The legal conundrum is clear. The *First English* decision has been interpreted to apply *only* to invalidated ordinances on the West Coast, while in New Jersey, the very same decision now *never* applies to an invalidated ordinance. That other courts seem equally confused only adds to the need for immediate resolution of this legal crisis.[3]

Fortunately, this Court has already accepted the *Tahoe-Sierra* case for review, though limiting argument to the question of whether moratoria can constitute a taking. By accepting this case for review as well, this Court can further clarify the *First English* decision in the context of the jurisdictional split which now exists, and answer clearly the question at hand – whether an invalid governmental action, temporary as it may be, can lead to a temporary taking.

Such a question is far from academic, as both the New Jersey and Ninth Circuit opinions underscore. Confusion on the applicability of the *First English* temporary takings

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[3] *See, e.g., John E. Long v. Borough of Ringwood*, 61 F.Supp.2d 273 (D.N.J. 1998)(*First English* applies "even if the government authority later amends, withdraws, or invalidates the original regulation or action that caused the taking." *Id.* at 287); *Miller and Son Paving, Inc. v. Plumstead Township*, 717 A. 2d 483 (Penn. 1998)(*First English* does "not involve the invalidation of an unconstitutional zoning ordinance." *Id.* at 486).

doctrine to governmental actions – both valid and invalid alike – will lead to more decisions as far removed as those in New Jersey and the Ninth Circuit, with the primary victim being the Fifth Amendment protection of property rights.

II. IT IS THE IMPACT ON THE PROPERTY AS THE RESULT OF A TAKING, NOT THE IMPACT ON A GOVERNMENTAL ENTITY WHICH IS REQUIRED TO PAY JUST COMPENSATION, WHICH A COURT MUST CONSIDER IN A TAKINGS CLAIM

In reaching its decision to deny consideration of the Petitioner's takings claim, the New Jersey Supreme Court purported not only to rely on precedent, but also on practicality.

After arguing that property rights lost in an appeal of an invalid ordinance was no different than "regulatory delay in securing a change in, or variance from, a zoning ordinance," *Pheasant Bridge* at 344, the New Jersey Supreme Court went on to declare that holding a government liable for a taking for an invalidated ordinance was just plain dangerous.

To make a municipality pay just compensation in such circumstances "could have a chilling effect on land-use planning, for the adoption of an invalid ordinance could prove financially devastating to a municipality that was unsuccessful in its defense to a drawn-out constitutional challenge." *Id.*

That the New Jersey Supreme Court expressed such concern for governmental actors may be heart-warming to municipal associations everywhere, but it grossly misinterprets the proper role of a court in a takings analysis.

> The court's role "is not to make policy choices about the best ratio of regulation to individual rights, but to answer the question whether the public must pay for its regulations in this case. If those regulations take property the Constitution gives a simple answer: yes it must. The Founders chose to provide for just compensation, and this court must determine whether the Takings Clause is triggered by the facts before us.

Florida Rock Industries v. U.S., 45 Fed. Cl. 21, 24(1999)

Indeed, the very language of the *First English* decision – in a passage which was apparently missed by the New Jersey Supreme Court – notes that the protection of constitutional rights, not the impact on governmental action, is at the heart of a takings claim.

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just

> Compensation Clause of the Fifth Amendment is one of them.
> *First English*, 482 U.S. at 321.

Even were there not such a significant difference of interpretation between New Jersey and the Ninth Circuit regarding the application of *First English*, the New Jersey Supreme Court's misplaced sympathy for governments facing just compensation awards led it down a constitutionally suspect pathway all by itself. To base rejection of a takings claim, even in part, on the impacts an award would have on the entity responsible for the causing the taking in the first place is as legally indefensible as refusing to try an alleged criminal because the prosecutor though it would hurt her reputation.

The takings clause exists to protect citizens from an overreaching government, not the government from claims for just compensation, no matter how large. The New Jersey Supreme Court forgot this central element of our Constitution. This Court must remind its fellow jurists how the Fifth Amendment is meant to be read.

CONCLUSION

For the reasons above, the National Association of Home Builders urges this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the decision of the New Jersey Supreme Court.

DATED: December 28, 2001

Respectfully submitted,

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